J.A. treated the matter almost as irrelevant. The reason no doubt was that the appellant had had ample opportunity before the annual general meeting in question to attend at the company's office had he desired to do so and inspect the books of account. In the circumstances it is not material to consider whether his demand for a poll was properly refused or not. Under the articles the matter is debateable.

Their Lordships at the end of the full and vigorous argument for the appellant did not feel it necessary to call upon counsel for the respondents to reply. In their view this is clearly a case where the discretion of the courts below was properly exercised, and there are no grounds upon which their Lordships could properly interfere with it. They will accordingly report to the Head of Malaysia their opinion that this appeal should be dismissed and that the appellant should pay the costs.

Appeal dismissed.

Solicitors: *Lovell, White & King; Peacock & Goddard.*

PUBLIC PROSECUTOR v. LO AH ENG

[F.C. (Wylie C.J. (Borneo), Tan Ah Tah F.J. and Harley J.) December 3, 1964]

[Kuching — Federal Court Criminal Reference No. 1 of 1964]

Evidence — Adverse witness — No power to cross-examine one's own — Evidence Ordinance (Sarawak Cap. 54), ss. 140 and 157.

The question raised in this criminal reference was: "Whether a witness who in the opinion of the judge proves adverse to the party calling him may be cross-examined by such party, under the Evidence Ordinance of Sarawak".

Held: there is no general power under the Evidence Ordinance of Sarawak under which a party may be permitted to put to its own witness who in the opinion of the court proves adverse, questions that may normally be put only in cross-examination as defined in section 140 of the said Ordinance.

[Editorial Note: See *Public Prosecutor* v. *Loh Ah Eng* [1964] M.L.J. 396 and the Editorial Note thereto].

FEDERAL COURT.

C. T.Tan (Assistant Attorney-General) for the appellant.

George Seah for the respondent.

Cur. Adv. Vult.

Wylie C.J. (Borneo): The question to be answered in this criminal reference, as amended at the hearing of the application, is as follows:—

"Whether a witness who in the opinion of the judge proves adverse to the party calling him may be cross-examined by such party, under the Evidence Ordinance of Sarawak."

As the argument for the appellant developed, it became likely that the question to which the answer of this court was sought, might more correctly be stated as a question whether such cross-examination may be allowed notwithstanding the provisions of the Ordinance. However, the views to be expressed by the court will no doubt dispose of the real question involved, irrespective of the form in which it was posed for the court's consideration.

These proceedings arise out of a trial in the High Court at Kuching in which the respondent was acquitted of the offence with which he was charged. In the course of the trial two witnesses for the prosecution were ruled adverse and the Deputy Public Prosecutor, in order to discredit them proved, in each case, a statement the witness had made to the police by calling the police officer who had taken the statement. Prior to this proof, each witness had admitted making his statement when it was shown to him by the Deputy Public Prosecutor, apparently pursuant to section 157 of the Evidence Ordinance. In addition, when the statement was translated to them, the witnesses then under cross-examination by the Deputy Public Prosecutor, said that the statements were true. In one case, apparently the whole statement was put in detail to the witness. The prosecution then sought to rely on the contents of each statement to the extent that was warranted in the special circumstances, not as a previous statement, but as having been incorporated by the witness's answers in his evidence given in court.

In his judgment, the judge expressed the view that the contents of the statement could in this manner be made part of the evidence of the witness given in court, if in fact there is a right or power to cross-examine an adverse witness by the party calling him. He came to the conclusion that there was no such right in Sarawak and that therefore that part of each witness's evidence given in reply to cross-examination by the Deputy Public Prosecutor must be disregarded by the court. He based this conclusion on the view that the Evidence Ordinance constituted a complete code of the law relating to evidence in Sarawak and that therefore common law did not apply to this question. He could find no provision in the Ordinance corresponding to section 154 of the Indian Evidence Act, 1872, which gives power to allow a party to cross-examine his own witness, and considered that, as section 157 did not authorise this course, a similar power did not exist in Sarawak. The matter has been brought before this court for it to determine whether the trial judge was correct in his ruling that a party may not, in Sarawak, cross-examine his own witness who proves to be adverse.

In an able and well developed argument, the

Assistant Attorney-General submitted that an adverse party could be cross-examined with the leave of the court. He submitted that this was permissible at common law and that, by virtue of section 2 of the Application of Laws Ordinance, which was enacted in 1949, this provision of the common law was undoubtedly in force in Sarawak prior to the enactment of the Evidence Ordinance, which was enacted in 1956. He submitted that the Evidence Ordinance was not to be considered a complete code of evidence and pointed to differences between this Ordinance and the Indian Evidence Act, 1872. In particular, he pointed out that, whereas the Indian Act contains in section 154 the widest possible power to a court to permit a party to cross-examine his own witness, and does not contain a section corresponding to section 157 of the Sarawak Ordinance, the latter does not contain section 154, but only section 157 dealing with a much narrower field — discrediting one's own witness who proves adverse, by calling other evidence. He submitted that the Sarawak Ordinance could therefore not be considered a complete code of the law of evidence in Sarawak, that it could not therefore be said to have repealed and replaced all the common law principles previously applicable and, in particular, had not repealed or replaced the principle concerning cross-examination of one's own witness who proves adverse. In support of this conclusion, he referred to authorities to the effect that a provision must be clear and precise to have the effect of repealing a power given by common law, and submitted that the "other provision" referred to in section 2 of the Application of Laws Ordinance must similarly be clear and precise to replace the application of a common law principle made applicable by that section.

Mr. Seah, for the respondent, submitted that the Evidence Ordinance was a complete code, as the Indian Evidence Act, 1872, has been held to be. He referred to the long title and section 2 of the Sarawak Ordinance. He referred to the statutory definition of cross-examination in section 140 and to section 145 as prohibiting leading questions being put to a party's own witness on the ground that the witness had proved adverse, which, he submitted, was really what the English common law rule permitted. He submitted that section 157 was a limited power given in place of the wider power at common law and the still wider power given under section 154 of the Indian Act and that the subject had therefore been dealt with in this manner, so that the code of law was complete and the common law principle excluded.

There is no doubt that the Indian Evidence Act, 1872, has repeatedly been declared to be a complete code of the law of evidence for India, and, although not exhaustive as to rules of evidence contained in statute law, to replace any part of the English common law of evidence that may previously have been in force in India. That view has been based not merely on the obvious fact that the Act endeavours to codify all the general law of evidence, but also on certain specific provisions. The preamble provides that it was "expedient to consolidate, define and amend the law of Evidence". Section 1 provides that the Act, generally speaking, applies to "all judicial proceedings in or before any Court". Section 2, since repealed, provided for repeal of existing laws and provided, in part, for the repeal of "all rules of evidence not contained in any Statute, Act or Regulation". There was thus a specific repeal of the common law principles of evidence.

The Assistant Attorney-General drew attention to the absence of any such specific repeal of the common law principles in the Sarawak Evidence Ordinance. It is clear that, by virtue of section 2 of the Application of Laws Ordinance, these principles were in force in Sarawak prior to the enactment save in so far as other provision had been made by written law. Prior to the enactment of this Ordinance there was no written law covering the general principles of the law of evidence. In the absence of the specific provision for repeal of unwritten law, there may still be an implied repeal. The long title to the Sarawak Ordinance describes it as an Ordinance "to lay down the law relating to evidence in Sarawak and to provide for matters incidental thereto", and the Ordinance certainly proceeds to deal with principles of evidence apparently in as comprehensive a manner as does the Indian Act, on which it is obviously based. Indeed, it provides for a considerable number of matters not provided for in the Indian Act, although it must be observed that it also omits a lesser number of provisions that are contained in the Indian Act. Moreover, section 2 of the Sarawak Ordinance provides that the Ordinance, with certain exceptions, shall apply "to all judicial proceedings in or before any Court". The exceptions do not seem to affect the question whether the Ordinance can be regarded as a complete code of the general principles of evidence. When an Ordinance has as its object "to lay down the law relating to evidence" and is to apply "to all judicial proceedings in or before any Court" and then proceeds to "lay down" that law by enacting, substantially, the provisions of a law which it is common knowledge was drafted and enacted as a complete code of the general principles of the law of evidence (albeit with some alterations, additions and a minor number of omissions) it seems difficult to escape the conclusion that the

intention of the legislature in enacting that Ordinance was equally to enact a complete code and, therefore, to repeal by implication any existing unwritten law applying to the matters provided for in the Ordinance.

Apart from the question whether there is an implied repeal of all common law principles of evidence, where the ordinance has dealt with a particular subject, that must clearly lead to the conclusion that the provisions of the Ordinance on that subject are to replace the common law principles on the same subject and so have impliedly repealed the latter. The subject with which this question is concerned, is the witness who proves adverse to the party calling him. The whole subject of examination of witnesses is comprehensively dealt with in Chapter X of the Ordinance and section 140 gives rise to a minor question of terminology in considering the question before this court. Subsection (1) states that the examination of a witness by the party who calls him shall be called his examination-in-chief and subsection (2) states equally categorically that the examination of a witness "by the adverse party" shall be called his cross-examination. There seem to be no exceptions to these definitions. What the question is concerned with, of course, is whether a party may put to his own witness who proves adverse, the same questions as could be put in cross-examination, as defined in the Ordinance. Section 146 permits leading questions in cross-examination, sections 148 and 149 authorise other matters in cross-examination, and I understand the question to raise the issue whether these matters, and any others, that may be raised only in cross-examination, may be raised in the examination of a witness by the party calling him, when the judge has ruled the witness to be adverse.

Sections 157 and 158 deal with the subject of impeaching the credit of a witness by the party who has called him. They do not authorise cross-examination specifically, nor do they authorise, in general terms, putting to the witness "any questions....which might be put in cross-examination by the adverse party", as is authorised by section 154 of the Indian Act and by a similar provision in the Evidence Ordinances of Malaya, Singapore and Sabah. The Sarawak Ordinance, alone in Malaysia, omits this provision and substitutes in its place in the Ordinance section 157, which does not appear in any of the other Ordinances I have mentioned. The Indian section 154 and the Sarawak section 157 both deal with the subject of a witness who proves adverse to the party calling him but, instead of giving the general power to put any questions that may be put in cross-examination, the Sarawak section only gives power to prove against him previous contradictory statements and provides a procedure similar to that provided for in section 148 which deals with cross-examination relating to previous statements. Section 158 provides in wider terms for impeaching the credit of a witness, including, with the consent of the court, the right to do so in the case of the party's own witness. Obviously this section may be used when the witness has proved adverse.

The Assistant Attorney-General argued that the omission of a provision corresponding to the Indian section 154 meant that the Ordinance did not cover the whole subject of cross-examination of an adverse witness as permitted at common law, that sections 157 and 158 dealt only with the subject of impeaching witnesses by calling other evidence and that therefore the answer to the question as to what questions may be put to the adverse witness himself, is still governed by the common law principles on this subject. This ingenious argument ignores two important features. The first is that, properly considered, the subject is what can be done if a witness proves adverse (not merely what questions may be put to the witness) and that subject is dealt with in sections 157 and 158. The other is that it is difficult to infer that the legislature, in enacting this comprehensive enactment and making a deliberate omission from that part of the precedent obviously being followed, which authorises cross-examination of an adverse witness, and substituting for it a specific, but different and narrower, provision dealing with the same subject, which does not authorise cross-examination intended in this roundabout manner to retain this power to order cross-examination and thus create an exception in "laying down the law relating to evidence" and leave in existence a common law principle on the same subject. Moreover, that principle would conflict with section 145 dealing with leading questions. For the only leading questions that that section authorises the court to permit in examination-in-chief and in a re-examination (as defined in section 140) are those referred to in subsection (2) of that section. To permit a party to ask other leading questions of his own witness, even if adverse, would be contrary to that section and thus one of the principal results of the application of the common law principle is prohibited.

The Indian section 154 is wider than the common law principle in that it is not necessary that the court should rule the witness to be adverse. The Sarawak section 157 is narrower than the common law principle in that it does not permit all questions that would be permitted in cross-examination. The obvious inference to be drawn from enacting this part of the Ordinance in this form is that the legislature

intended section 157 to take the place of both the Indian provision and the common law principle, and that therefore the latter has been impliedly repealed.

The Assistant Attorney-General drew attention to the fact that section 157 is identical with section 3 of the Criminal Procedure Act, 1865, of England and that, in England, the latter section is, by its terms, confined to the subject of the procedure for discrediting one's own witness by proving that he has made contradictory statements, and that it does not affect the common law principle that a party may, at the discretion of the court, be permitted to cross-examine his own witness who has proved hostile. He submitted that this court ought therefore to take the view that section 157 did not affect the application of the common law principle. The difference is, of course, that in England this provision does not occur in an enactment which seeks to codify the general principles of the law of evidence. The effect of the provision, when it so occurs, cannot be determined without making due allowance for that objective of the enactment and without looking at the enactment as a whole to see whether there is any other provision that might be affected by taking the view for which the appellant contended. And, as I have said, such a view would conflict with the specific provisions of section 145 and with the general objective of the Ordinance. Because of these features, it cannot be said that the Ordinance as a whole does not affect the application of this common law principle. Consequently, the conclusion, looking at the entire Ordinance, must be that the legislature has intended to substitute for that principle the provision contained in section 3 of the Criminal Procedure Act, 1865.

I would answer the question before this court by saying that there is no general power under the Evidence Ordinance of Sarawak under which a party may be permitted to put to its own witness who in the opinion of the court proves adverse, questions that may normally be put only in cross-examination as defined in section 140.

Tan Ah Tah F.J.: The question of law which has to be determined in this matter is as follows:—

> "Whether a witness who in the opinion of the judge proves adverse to the party calling him may be cross-examined by such party, under the Evidence Ordinance of Sarawak."

It should be noted at the outset that section 154 of the Indian Evidence Act, 1872 has been reproduced in the Evidence Ordinance of Malaya, Singapore and Sabah but has been omitted from the Evidence Ordinance of Sarawak. Section 154 of the Indian Evidence Act reads as follows:—

> "154. The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party."

It would appear that instead of enacting section 154 of the Indian Evidence Act the legislature of Sarawak chose to reproduce section 3 of the Criminal Procedure Act, 1865 of England by enacting it without any material difference as section 157 of the Sarawak Evidence Ordinance. This section 157 reads as follows:—

> "157. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the Court prove adverse, contradict him by other evidence, or, by leave of the Court, prove that he has made at other times a statement inconsistent with his present testimony; but, before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he has made such statement."

In none of the Evidence Ordinances of Malaya, Singapore and Sabah are the provisions of section 157 to be seen. As I have stated, the provisions of section 154 of the Indian Evidence Act, which are much wider in scope, have been reproduced in those Ordinances.

Until the Sarawak Evidence Ordinance was enacted, the English law of evidence was applicable to Sarawak. There is no doubt that in England when a witness proves adverse to the party calling him, he may in certain circumstances be cross-examined by such party. The Assistant Attorney-General submitted that in spite of the enactment of the Sarawak Evidence Ordinance, this principle of the English law of evidence continued to remain in force in Sarawak. In considering this argument it is relevant to observe that the subject of examination of witnesses is dealt with in a comprehensive manner in Chapter X of the Sarawak Evidence Ordinance. By enacting section 157 of the Ordinance and omitting to reproduce section 154 of the Indian Evidence Act, the legislature of Sarawak must, in my view, be taken to have intended to confer on parties against whom witnesses called by them have proved to be adverse rights which are narrower in scope than those enjoyed by litigants in other parts of Malaysia.

In my judgment, the answer to the question before this court is that a party is not permitted to cross-examine a witness who in the opinion of the judge proves adverse to the party calling him nor is such party permitted to put any questions to such a witness which might be put in cross-examination by the adverse party.

Harley J.: If a simple answer is required to the question "In Sarawak how far can a party cross-examine his own witness?" the short answer is "Not at all"; because by definition (section 140(2) Cap. 54) cross-examination is

confined to questioning a witness called by the adverse party.

The general rule of English law was and is that a witness may not be discredited by the party producing him. As an exception to the general rule, section 157 Cap. 54 in Sarawak and section 3 of the Criminal Procedure Act, 1865, in England lay down ways in which such a witness may be discredited. The question which does need answering is limited to how, and how far, may examination-in-chief of a witness be conducted in the manner of cross-examination.

To start with, this witness may be asked questions in the nature of cross-examination by the party calling him only if he proves adverse to that party. The judge must first rule whether he is adverse. Suppose he is ruled adverse, the next part of the question is "To what extent may the witness be adversely questioned?" Both in England and in Sarawak, such questioning is limited to his own previous statements oral or written. Supposing that a previous statement is oral, counsel mentions the particular occasion to the witness, and asks whether or not he made such a statement. If the witness says "No", then counsel, if the court rules the witness adverse, may call the person to whom the statement was made.

Suppose, however, that the previous statement is written, and apparently signed by the witness. Counsel will first draw attention to the occasion of the statement. The statement will then normally be passed to the judge to look at, and counsel will ask leave to treat the witness as adverse. If the court gives leave, counsel may question the witness on his statement, which is inconsistent with the evidence given by the witness in court up to this point. The statement will probably be put by counsel to the witness, sentence by sentence. If the witness admits the contents of the statement and his signature, what he says in court becomes part of his evidence. As by this stage the witness has already contradicted himself, his evidence as a whole may be given little weight.

Suppose the witness denies the written statement, and repudiates his signature. Again it may be read out to him and evidence called to show that in fact he did make and sign the statement. Then, however, the content of that statement cannot become positive evidence; it is negative evidence in the sense that it can only be used to destroy or contradict the evidence which went before. In a sense, the previous statement is like an india-rubber — it does not produce written testimony, but merely erases the evidence given in the witness box. The earlier statement cannot be substituted for the evidence in court which is disbelieved.

I deliver this short judgment almost in the form of a practice note for the sake of simplicity. The marginal note to section 157 Cap. 54 reads: "How far witness may be discredited by the party producing". I am fully satisfied that section 157 is meant to lay down certain limits. Section 157, in regard to contradicting your own witness, does clearly direct: "Thus far you may go, and no further."

The question referred to this court arose out of a criminal trial. The rule in civil cases is the same in Sarawak, and was the same in England up to 1938. The judge, however, clearly has a wider discretion to admit statements in civil cases than in criminal cases. In this respect I quote from *Cross* on Evidence, at p. 213:

> "The rule that a previous statement which is contradicted by its maker at the trial cannot be treated as evidence of the facts stated if it does not constitute an admission by a party to the proceedings is generally sound, but circumstances are conceivable in which it should be waived. Suppose, for example, that a quarrel had taken place between a party and his witness after the statement had been made, the statement should sometimes be received as evidence in the case. There is, however, no doubt that this can never be done in criminal proceedings, but it is open to question whether the absolute character of the rule has not been modified by the Evidence Act, 1938, so far as civil suits are concerned."

I need hardly add that the English Act of 1938 does not affect the law in Sarawak. Perhaps it should be stressed that the question put to this court and the answers given are limited to the law as it is in Sarawak.

Question answered.

GURUSAMY v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong J.) December 3, 1964]

[K.L. — Criminal Appeal No. 81 of 1964]

Penal Code, ss. 380 and 411 — Theft and dishonestly retaining stolen property — Evidence.

Evidence Ordinance, 1950, s. 27.

The appellant was charged under section 380 of the Penal Code for the theft of 45 cartons of Scotch Whisky committed in a vessel used for the custody of property some time between December 20 and December 23, 1963; alternatively under section 411, that between the same dates he dishonestly retained such stolen property knowing or having reason to believe them to be stolen property. The evidence showed that he was the wharfman on duty between 7 a.m. to 11 p.m. on December 21 and the vessel which was towed to the wharf in question about 10.45 p.m. on December 20 was discovered missing at 11 a.m. on December 23, i.e. 60 hours later.

The prosecution alleged that the appellant led prosecution witnesses to the place were on the previous day the investigation officer had recovered some of the stolen goods. Then, proceeding further along the beach, he led the detectives into the mangrove where more of the stolen goods were found. In his cross-examination of the prosecution witnesses the appellant challenged their testimony that he led them "into the mangrove and pointed out the stolen property to them". In his own evidence